advantage of the way of escape from the burdensome agreements of their representatives. *Milwaukee Electric Ry. Co.* v. *R. R. Com. of Wis.*, 238 U. S. 174. So long as the rate revision was downward the public enjoyed the rule. But chickens tend to come home to roost, and this rule allowing a legislature to override an agreement made by a municipality is doing it. The last two years has seen an unprecedent upward turn in the curve of prices and rates. Federal commissions are permitting increases of state-fixed rates, 16 MICH. L. REV. 379, and state commissions are raising municipality-fixed rates. This revision upward, in the face of charter agreements, is not so agreeable to the public. The Supreme Court in *Englewood* v. *Denver and South Platte Ry. Co.*, U. S. Adv. O., Jan. 7, 1919, page 149, upheld the decision of the Colorado Supreme Court "that this town, at least, deriving its powers from legislative grant, could make no contract of this sort that was not subject to control by the legislature; that the Public Utilities Commission had been authorized by the legislature to regulate the matter in controversy; that it had done so; and that this proceeding should be dismissed." The result is that many municipalities seem to be in a position where their charter contract with public utilities is valid against, but not for them. The war conditions may soon pass, but if not the bigger question is not far away, viz., the effect against the state itself of charter provision as to rates which do not yield a fair return, or any return, on the value of the property devoted to a public use. Whatever agreements may have been made, public utilities cannot be permanently operated at a loss. What will become of these charter-fixed rates?

PUBLIC OFFICERS—RECESS APPOINTMENT—LIMITATION ON EXECUTIVE'S POWER.—The governor of Pennsylvania forwarded to the state senate the name of Daniel F. Lafean for confirmation as commissioner of banking for the regular term. The senate rejected the nomination and shortly after the final adjournment of that body the governor appointed Lafean to fill the vacancy in the office and to serve until the end of the next session of the senate. Lafean entered on the duties of his office, and the payment of the salary being refused him brought mandamus to compel the auditor general and state treasurer to approve and pay him the salary attached by law to the office. The defendants appealed from the decision of the trial court awarding a peremptory writ and the Supreme Court of Pennsylvania, with a court divided four to three, affirmed the decision. *Commonwealth ex rel Lafean* v. *Snyder*, (Pa., 1918), 104 Atl. 494.

The constitution of Pennsylvania contained the following common state constitutional provisions: The Governor "shall nominate, and, by and with the advice and consent of two-thirds of all the members of the Senate, appoint * * * such * * * officers of the commonwealth as he is or may be authorized by the Constitution or law, to appoint; he shall have the power to fill all vacancies that may happen, in offices to which he may appoint, during the recess of the Senate, by granting commissions which shall expire at the end of their next session; * * * if the vacancy shall happen during the session of the Senate, the Governor shall nominate to the Senate, before

their final adjournment, a proper person to fill said vacancy." A majority of the court reasoned that the constitution expressly authorized the governor to fill vacancies happening during the recess of the senate and did not expressly place any restriction on his choice in making such a temporary appointment. They refused to find that any such restriction was to be implied from the constitution. The minority judges dissented on the ground that the constitution by implication prevented the governor from appointing to office, for any portion of the term thereof, a person whom the senate had rejected for appointment to the same office for the full term. The majority opinion mentions but does not discuss the point as to when the vacancy occurred. There is slight authority to the effect that where a vacancy occurs before the adjournment of the senate, it is not a vacancy happening during the recess of the senate or, in other words, the office does not become vacant during the recess. *People* v. *Forquer* (1825), 1 Ill. 104. Other courts have taken the opposite and better view and held that though the vacancy first occurred during the session of the senate, it continues to exist or "happen" until filled, and the power of recess appointment therefore embraces the power to fill temporarily a vacancy which existed when the senate was in session and for some reason was not filled. *In re Farrow* (1860), 3 Fed. 112; *State* v. *Kuhl* (1889), 51 N. J. L. 191. It is therefore entirely probable that had this point been decided by the court in the instant case it would have been settled that the vacancy "happened" during the recess of the senate and the governor's power of appointment would have been upheld. On the main point discussed by the court in the instant case the majority of the court appear to have been right. The governor's power to nominate and, by and with the advice and consent of the senate, to appoint a person to fill an office for the full term is entirely separate and distinct from the governor's power of recess appointment. The mere fact that the two powers are conferred by the same section of the constitution furnished no reason for limiting one by the other. Nothing in the language of the section conferring these powers creates an implication that the governor's power of choice in making a recess appointment is limited by the senate's approval or disapproval of the person selected. As shown in the majority opinion in the instant case, the implication contended for by the minority judges is so doubtful that it has been found necessary to insert in many state constitutions express provisions to secure the same effect sought to be obtained by the implication contended for in this case. The power of the executive to appoint to office, during the recess of the senate, to fill a vacancy and serve until the end of the next session, a person who has been rejected for appointment to the same office for the regular term by the senate before its adjournment has been the subject of much speculation. This seems to be the first case in which the point is squarely decided.

SALES—RIGHT TO RESCIND FOR BREACH OF WARRANTY.—Action to rescind the sale of an auto truck for breach of warranty. *Held,* Appellee by using the truck a year, though intermittently complaining of defects, had waived his right to rescind. *International Harvester Co. of America* v. *Brown* (Ky. 1918), 206 S. W. 622.